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STATEMENT OF THE CASE

In *State v. McFadden* (I), 191 S.W.3d 648 (Mo.banc), cert. denied, 127 S.Ct. 666 (2006), the Missouri Supreme Court found, under the totality of the circumstances, that the State's use of five peremptory challenges against black veniremembers was "merely pretext for the State's exercise of its peremptory strikes for racially discriminatory reasons." *Id.* at 657. In this case, the same Assistant Prosecutor again exercised his peremptory challenges to remove black veniremembers. He peremptorily challenged four black women, leaving only one black woman on the jury. (T943)[1]. That woman was removed for hardship immediately before opening statements, thus, an all-white jury convicted Mr. McFadden and sentenced him to death. (T990-99). Defense counsel timely challenged the State's strikes[2] under *Batson v. Kentucky*, 476 U.S. 79 (1986). (T944).

The State provided three reasons for striking Ms. Harris, one of the black veniremembers. He stated Harris was the only person on the panel without a physical reason for not having a driver's license; she had "crazy-looking red hair," and her demeanor seemed hostile. (T950-51). He stated that her demeanor and responses made him believe she was lying to him about her ability to impose the

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[1] Citations to the transcript are referenced "T__."
Citations to the Appendix to the Petition for Certiorari are referenced "App. at__."

[2] Of those five, trial counsel subsequently waived her *Batson* challenge to two and appellate counsel pursued two on appeal to the Missouri Supreme Court.(App. at 4); *State v. McFadden* (II), 216 S.W.3d 673 (Mo. banc 2007). That Court granted relief as to one of the struck venirepersons, Sherlonda Harris. (App. at 5); *McFadden II*, 216 S.W.3d at 675.

death penalty. (T950-51, 964-65). He later acknowledged that the "unlicensed driver" reason was not "that big of a deal." (T966). At sentencing, another Assistant Prosecutor stated, "This was not Lucille Ball red hair. This is more like Ronald McDonald's red hair. It looked like clown red hair. It tended more towards the orange side. She had indicated that she wanted to stand apart from the crowd by her physical appearance, it was so striking." (T1594).

Defense counsel countered the State's justifications. She stated that Harris's lack of a driver's license was irrelevant to her ability to sit and to the issues presented. (T962). When the State responded that her lack of a driver's license signified Harris was not "vested" in the community, defense counsel noted that a host of reasons may dictate why someone lacks a driver's license. She further noted that Harris was never asked why she had no license. (T966-68).

> Defense counsel also countered the State's "red hair" reason. She stated,
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> I think you may be able to find numerous women in the community, particularly in the African-American community, that would have their hair dyed that color as a fashion statement. I think it's popular. There are very, very popular entertainers, such as Mary J. Blige, B-L-I-G-E, who have that same color hair. I don't think that the fact that her hair is that color red makes her crazy or weird, as Mr. Bishop has stated, I believe, off the record.

(T962). Counsel further noted that Harris was "very neatly," "very fashionably dressed. She did not appear to be crazy at all." (T962). Counsel went on, "While

her red hair might set her apart from Mr. Bishop's crowd, it certainly does not, I guarantee you, set her aside from her community of African-American women. So it makes it even actually more of a racial issue." (T967).

The trial court reviewed voir dire and Harris's "just very plain simply yes and no answers." (T968). He perceived Harris had been offended by the State's questions about her lack of a driver's license but found she did not seem offended by either side during death penalty voir dire. (T968-69). He was not even sure the questions offended her but thought they had. (T973-74). He found no logical relevance between the case and her lack of a driver's license. (T973-74). Finally, he stated that Harris's was a "very distinctive red hairstyle," which "does distinguish her and makes her separate from the crowd, and very individualistic." (T972-73).

The trial court initially opined, after researching the *Batson* issue, that he was inclined to disallow the prosecutor's strikes. (T1592). The prosecutor responded, in raised tones, that, if the court disallowed his strikes, he would be labeling the prosecutor a racist and a liar. (T1592). The trial court ultimately denied defense counsel's *Batson* challenges.

The Missouri Supreme Court reversed. *McFadden* II, 216 S.W.3d at 674; (App. at 2). It engaged in a fact-specific inquiry of the State's rationale for striking Harris. *Id.* at 676-77; (App. at 6-7). It noted the trial court had been "initially inclined to sustain McFadden's *Batson* challenges but then retreated." *Id.* at 676; (App. at 6). It noted that defense counsel had refuted the State's assertion

that Harris's hair color was "crazy," and had stated without challenge that Harris was neatly dressed. *Id.* at 676; (App. at 6). It noted that the State had misperceived Harris's reaction as hostile. *Id.* at 676, n. 17; (App. at 6). And, it noted the State's scrutiny of Harris's driver's license. *Id.*; (App. at 6-7). Further, it noted that, even were Harris's hair as unusual as the State posited, the State had failed to show how her "Ronald McDonald red hair" color was related to the case. *Id.* at 677; (App. at 7).

The State announced its intention pre-trial to introduce evidence of Vincent McFadden's conviction and death sentence in another case that was then on appeal to the Missouri Supreme Court. (T38). In this penalty phase, the State introduced the certified copy of that conviction and presented photographs, a diagram of the scene and a video of that victim's body. (T1294-1311). In penalty phase closing, the State argued that the jury should consider Mr. McFadden's criminal history, including his prior death sentence, in deciding his punishment in this case. (T1543-46). In sentencing Mr. McFadden to death, the jury found, as two of six statutory aggravating circumstances, Mr. McFadden's first-degree murder and armed criminal action convictions. *McFadden* II, 216 S.W.3d at 677; (App. at 8).

After trial but before formal sentencing by the court, the Missouri Supreme Court reversed the death sentence upon which the jury's finding in this case was partially predicated. *McFadden* I, 193 S.W.3d. 648; (App. at 8). Defense counsel here requested that the trial court grant a new trial based on that decision. (T1574). The trial court refused and sentenced Mr. McFadden to death.

The Missouri Supreme Court found that, because "the jury's recommendation in this case was based partly on factors that this Court nullified, the sentence cannot stand." *McFadden* II, 216 S.W.3d at 677; (App. at 8). The Court rejected the State's argument that this Court's decision in *Johnson v. Mississippi*, 486 U.S. 578 (1988), does not mandate reversal. The State had argued that, even if the prior convictions and death sentence were not properly considered as statutory aggravating circumstances, the underlying facts of the offenses would still be admissible as non-statutory aggravating circumstances. *Id.* at 678; (App. at 9-10).

The Court also rejected the State's argument that this Court's decision in *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884 (2006), precludes relief. *Id.*; (App. at A-10). It held, under this Court's decision in *Brown*, that "when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *McFadden* II, 216 S.W.3d at 677, citing *Brown*, 126 S.Ct. at 892, citing *Stringer v. Black*, 503 U.S. 222, 232 (1992); (App. at 10).

SUMMARY OF THE ARGUMENT

In this second of two cases involving the same Assistant Prosecutor and this Respondent, the Missouri Supreme Court again properly followed procedures implemented following *Batson v. Kentucky*, 476 U.S. 79 (1986), and continuing to the present. In deciding whether Mr. McFadden met his burden of proving the prosecutor's discriminatory intent in removing black veniremembers, which removal left Mr. McFadden with an all-white jury, the Court considered the totality of the circumstances. The Court found that Mr. McFadden had met his burden of showing that, at step three of the *Batson* analysis, the prosecutor's explanations were merely pretexts for racial discrimination.

This Court has allowed each state judiciary to formulate its own particular mechanism to implement *Batson*. The Missouri Supreme Court should be allowed to determine when and how a defendant meets his burden of production and persuasion at step three of that analysis. The Missouri Supreme Court's holding here is limited to Missouri. It is fact-driven and fact-dependent. The Missouri Supreme Court applied the proper standard of review to those facts. The State of Missouri's displeasure with the result of the Missouri Supreme Court's careful application of long-standing precedent does not merit this Court's review. This opinion has no more import than any other state court opinion on a *Batson* claim. Contrary to the State of Missouri's suggestion that the Missouri Supreme Court has ignored this Court's holding in *Purkett v. Elem*, 514 U.S. 765 (1995),

the Missouri Supreme Court's decision conforms to *Purkett* and *Batson*. The Missouri Supreme Court found, at step three of the *Batson* analysis, that the prosecutor's rationale was a pretext for racial discrimination. The State of Missouri erroneously asserts that, if a justification is facially-neutral, the inquiry ends. The State thus requests that this Court review this case based upon its own flawed interpretation of *Batson*.

The State of Missouri's displeasure with the Missouri Supreme Court's application of *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884 (2006), is similarly insufficient to warrant this Court's review. The State of Missouri ignores both common sense and the plain language of *Brown*. It categorically states that informing a jury that a defendant was sentenced to death in another case adds nothing to the evidentiary facts and circumstances of the offense that it has considered as a sentencing factor.

The State of Missouri also misrepresents the record by stating that defense counsel injected the issue of the defendant's prior death sentence into the case. The record reveals that the Assistant Prosecutor maintained his intent to adduce that evidence pre-trial and then, in penalty phase, carried through on that promise. Because defense counsel's objections were overruled, she was forced to voir dire on the subject. Under the unique circumstances of this case, this action cannot be construed as having opened the door to evidence of Mr. McFadden's prior, invalid death sentence.

REASONS FOR DENYING THE WRIT

I. The Missouri Supreme Court followed long-standing precedent in evaluating the totality of the circumstances at step three of the *Batson* analysis.

The State condemns the Missouri Supreme Court for holding that the trial court clearly erred in denying Mr. McFadden's challenge, under *Batson v. Kentucky*, 476 U.S. 79 (1986), to the exclusion of Sherlonda Harris. The Missouri Supreme Court analyzed this claim in full accord with well-established precedent, both of this Court and Missouri courts. Considering the record made at step three of the *Batson* analysis, it found, under the totality of the circumstances, that the prosecutor's reasons for striking Ms. Harris were no more than pretexts for racial discrimination. Its holding has no more import than any other state court opinion on a *Batson* claim.

In evaluating claims of racial discrimination in jury selection, lower courts follow a three-step procedure. *Id.* at 93-98. First, the defendant must demonstrate a prima facie case of purposeful discrimination. *Id.* at 93-96. Second, the State must come forward with clear, specific, and legitimate race-neutral explanations for its strikes. *Id.* at 97, 98 n.20. Third, the trial court must determine if the defendant has established purposeful discrimination. *Id.* at 98.

At the third step, the trial court must consider whether "the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 93-94, citing *Washington v. Davis*, 426 U.S. 229, 239-42 (1976). To this end, the trial

court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93, quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). The trial court must "assess the plausibility [of the State's justifications for its strikes] in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 2331 (2005).

As this Court has noted, at step two, the prosecutor's rationale need not be persuasive or even plausible. *Purkett*, 514 U.S. at 768. The issue at that step is the "facial validity" of the explanation. *Id.* "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.*, citing *Hernandez v. New York*, 500 U.S. 352, 360 (1991). It is at step three of the process that "the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett*, 514 U.S. at 768; *Batson*, 476 U.S. at 98.

As this Court has instructed, Missouri courts are to consider the totality of the circumstances in reviewing claims of racial discrimination in jury selection. In determining whether a prosecutor has engaged in purposeful discrimination, trial courts are instructed to "take into account a variety of factors. *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992). The first factor, and the "chief consideration," is the "plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case." *Id.*; see also *State v.*

Edwards, 116 S.W.3d 511, 527 (Mo. banc 2003). Second, the court should consider the existence of similarly situated white jurors not struck by the State. *Id.* Third, it should consider the "degree of logical relevance" between the explanation and the case to be tried in terms of the nature of the evidence and the potential punishment. *Id.* Fourth, it should consider the prosecutor's statements and demeanor during voir dire, and the demeanor of the excluded jurors. *Id.* Fifth, it should consider the court's past experiences with the prosecutor, and sixth, it should consider "objective factors bearing on the state's motive to discriminate on the basis of race, such as the conditions prevailing in the community and the race of the defendant, the victim and the material witnesses." *Id.*; *Parker*, 826 S.W.2d at 939-40.

Here, the Missouri Supreme Court conducted the analysis mandated by this Court and by its own precedent regarding *Batson* claims. The Court found that the State had expressed three justifications for peremptorily striking Ms. Harris: first, she lacked a driver's license; second, she seemed hostile; and third, she had "crazy red hair." *McFadden* II, 216 S.W.3d at 675; (App. at 4-5). The Court noted that the trial court itself had rejected the first two justifications, finding Harris's lack of a driver's license irrelevant and perceiving that Harris was not hostile but "merely exasperated by the State's interrogation concerning the

license." *Id.*; (App. at 5).[3] The Court found "a clear *Batson* violation in the State's removal of S.H. for having red hair." *Id.*; (App. at 5).

The Missouri Supreme Court reached this conclusion after analyzing the totality of the circumstances. *Id.* at 676; (App. at 6). It noted that a strike based on clothing and attire, or indeed, on hair color, does not reflect an inherent racial bias. *Id.*; (App. at 6). Thus, since the prosecutor had articulated a rationale in which discriminatory intent was not inherent, the *Batson* inquiry would not stop at step two, but would proceed to the third step. *Purkett*, 514 U.S. at 768.

The Court went on to note that defense counsel had refuted the State's conclusion that Harris's hair color was "crazy," *McFadden* II, 216 S.W.3d at 676; (App. at 6), since the State had not contested counsel's record statements that, while the Harris's hair color might be unusual in the white community, it was common in the African-American community and "very, very popular entertainers, such as Mary J. Blige... have that same color hair." (T962). The Court additionally found that defense counsel had noted Harris was neatly dressed, thus refuting the State's allegation that Harris was "crazy" or "weird," as manifested through her hair color. *McFadden* II, 216 S.W.3d at 676; (App. at 6).

The Court further noted that, while deference is accorded to the trial court's assessment, that deference is not a rubber-stamp. *Id.*; (App. at 6). Indeed,

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[3] The State has not challenged that aspect of the Missouri Supreme Court's conclusion here. See, Cert. Pet. at 7-12. Therefore, the only question is whether the court's conclusion that the "red hair" justification was a pretext for racial discrimination was reached in accordance with established precedent.

as this Court has stated, "[d]eference does not by definition preclude relief." *Miller-El v. Dretke*, 125 S.Ct. at 2325; quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Especially in this case, the Missouri Supreme Court suggested, deference was inappropriate since the trial judge's initial inclination was to grant Mr. McFadden's *Batson* challenges but he then retreated. *McFadden* II, 216 S.W.3d at 676; (App. at 6). While the Missouri Supreme Court does not elaborate, the record clearly demonstrates that the trial court only "retreated" after the Assistant Prosecutor responded, in raised tones, that such a decision would label him a racist and a liar. (T1592).

Finally, the Missouri Supreme Court considered all of the circumstances surrounding the strike of Ms. Harris, including the two justifications that even the trial court had found illegitimate. *Id.*; (App. at 6-7). The Court found, on that basis, that the prosecutor's[4] explanations were "implausible and merely a pretext to exercise a peremptory strike for racially discriminatory reasons." *Id.* at 677; (App. at 7).

The State argues here that, "In short, without even mentioning *Purkett v. Elem*, the Missouri Court simply applied a racial gloss to a physical characteristic that this Court has previously deemed to be race neutral." (Cert. Pet. at 10). The State's argument ignores the Missouri Supreme Court's opinion that clearly

[4] Although the Court did not specifically mention that the same prosecutor found to have exercised his peremptory challenges in a racially-discriminatory fashion in *McFadden* I was the prosecutor here, that factor may have been sub-text to the totality of the circumstances it considered.

applied the appropriate analysis under *Batson*, finding, at the third step, that the State's "crazy red hair" justification was a pretext for racial discrimination, given the totality of the circumstances.

The faulty premise of the State's argument becomes crystal clear in its final assertion: "And by finding a facially race-neutral explanation to be discriminatory, the Missouri Supreme Court disregarded any consideration of the prosecutor's actual beliefs and motives, and instead adjudged the case solely through the prism of its own perceptions." (App. at 11-12). The State has engaged in the same misunderstanding for which this Court in *Purkett* called the Eighth Circuit to task—combining steps two and three of the *Batson* analysis. *Purkett*, 514 U.S. at 768. Just because a justification is facially race-neutral does not end the inquiry. If it is, it will survive step two. The question is whether, at step three, it survives scrutiny under the totality of the circumstances. Here, the Missouri Supreme Court determined that the State's justification did not. The Missouri Supreme Court properly applied the clear error standard of review.

The result in this case is fact-driven. It is based upon the Missouri Supreme Court's thorough review of the totality of the circumstances in this particular case. Contrary to the State's dire warnings, (Cert. Pet. at 10-12), it is therefore unlikely to have wide effect. Further, contrary to the State's assertions, the Missouri Supreme Court correctly applied this Court's decisions in *Batson* and *Purkett*, and, after reviewing the totality of the circumstances at step three of the process, found that the State's justification was a pretext for racial

discrimination. The Missouri Supreme Court should be allowed to determine when and how the defendant is to meet his burden of production and persuasion.

Mr. McFadden respectfully requests that the petition for a writ of certiorari be denied.

II. The Missouri Supreme Court's decision correctly applied *Brown v. Sanders.*

In its brief to the Missouri Supreme Court, the State argued that this Court's decision in *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884 (2006) compelled the conclusion that no constitutional error occurred when Mr. McFadden's jury heard that another jury had sentenced him to death, a death sentence that the Missouri Supreme Court subsequently invalidated in *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006). The Missouri Supreme Court unanimously rejected that argument. It found unpersuasive

> the State's implication that the Franklin convictions and death sentence were not critical to the jury's decision-making process. Of the six statutory factors on which the jury based its death penalty recommendation, only the two relating to the Franklin case involved a homicide. The other four involved assault and armed criminal action. The State implies that the jury's recommendation would have been the same based on these four weaker remaining factors.

McFadden II, 216 S.W.3d at 678; (App. at 10). The Missouri Supreme Court noted that, even if the underlying facts of the homicide were admissible, it could

not "assume that the jury's weighing process and sense of responsibility were unaffected by its knowledge that McFadden was already sentenced to death." *Id.*; (App. at 11).

The Missouri Supreme Court's opinion is thus directly in accord with this Court's recent decision in *Brown*. There, this Court stated that

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

Brown, 126 S.Ct. at 892 (emphasis in original). Under this analysis, therefore, the jury's decision will be skewed by its consideration of that invalid factor unless it could have considered that same factor under another, valid sentencing factor. *Id.*, citing *Stringer v. Black*, 503 U.S. 222, 232 (1992).

The State's argument, both in the Missouri Supreme Court and here, is that, since the jury properly could consider evidence of the other homicide, it could make no difference to its determination of punishment that it was told that another jury had sentenced Mr. McFadden to death. (Cert. Pet. at 12-13). In fact, the State specifically argues to this Court that, since "the jury could properly give aggravating weight to that evidence [of the other homicide] as a non-statutory circumstance, ... [the evidence met] the *Brown* standard." (Cert. Pet. at 13).

The State's own argument shows its faulty premise. The State presented the fact of Mr. McFadden's conviction of first degree murder under the rubric of a specific statutory aggravating circumstance—that Mr. McFadden had a serious assaultive criminal conviction. §565.032.2(1) RSMo (2000). The specific facts of the homicide itself are different, under Missouri law, than the fact of a serious assaultive criminal conviction.

Further, the specific facts of this case clearly demonstrate the State's belief at trial of the aggravating nature of a prior death sentence. The State before this Court ignores the record in this regard and attempts to blame defense counsel for placing this issue before the jury. (Cert. Pet. at 14). The record demonstrates otherwise.

Well before trial, defense counsel moved that the jury not be informed of the death sentence in the other case. (LF190-03). The Assistant Prosecutor stated that he intended to introduce the certified copy of the prior conviction and the fact of the death sentence. (T38). Specifically, he told the trial court that he believed that he needed to adduce evidence of the death sentence to show the seriousness of the offense. (T39). Despite the trial court's warning, the Assistant Prosecutor remained obdurate in his intention to adduce that evidence. (T43-44). In penalty phase, he presented records showing not just the conviction but also the death sentence, and showed the jury photographs, a diagram of the crime scene and a video of the body. (T1289-91). He argued, in penalty phase closing, that the jury should consider Mr. McFadden's criminal history, including the death sentence,

as they decided his punishment. (T1543-46). The jury found six statutory aggravating circumstances—two arising out of the prior homicide. (LF391-92).

Defense counsel repeatedly objected to the State's actions and, with the trial court's approval, specifically stated that the Assistant Prosecutor's insistence upon presenting evidence of the other death sentence obligated her to voir dire about the effect of that sentence upon the veniremembers. (T41-43). Defense counsel noted that such evidence was a critical fact upon which voir dire was required. *State v.Clark*, 981 S.W.2d 143, 147 (Mo.banc 1998). She further noted that, without such voir dire, designed to identify those unqualified jurors who, as a result of that information, would harbor bias or prejudice, Mr. McFadden's right to an impartial jury would be denied. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

The State attempts to argue that the Missouri Supreme Court's decision runs afoul of *Romano v. Oklahoma*, 512 U.S. 1 (1994) because, it asserts, *Romano* stands for the proposition that "a holding that admission of the evidence [of a prior death sentence] rendered the sentencing proceeding fundamentally unfair 'would ... be an exercise in speculation, rather than reasoned judgment.'" (Cert. Pet. at 14); *Romano*, 512 U.S. at 14. The State ignores the procedural history in *Romano* to reach its conclusion.

In *Romano*, the State introduced a copy of the judgment and sentence from one death penalty trial in the penalty phase of another trial. The former was

subsequently overturned and the Petitioner challenged the admission of that evidence in the latter on various grounds on appeal. *Id.* at 5-6.

Among those grounds was that the admission of this evidence violated *Johnson v. Mississippi*, 486 U.S. 578 (1988). Although the prior death penalty conviction was the only evidence that supported the submission of the "prior violent felony" aggravating factor, this Court found no *Johnson* violation. *Romano*, 512 U.S. at 11. This Court distinguished *Johnson* because the intermediate appellate court had struck the "prior violent felony" aggravating factor, reweighed the other aggravating factors, and concluded that the death penalty was warranted, even without that specific aggravator. *Id.*[5] This Court found that process consistent with precedent. *Id.* It went on to address the separate due process claim of whether the introduction of the subject evidence rendered the death sentence so unreliable as to violate due process. *Id.* at 12-13. Citing the lower court's opinion, the Court again noted that the untainted aggravators still outweighed the mitigating circumstances, *Id.* at 13, and, stated that, even if the jury considered the evidence in question, it was "impossible to know how this evidence might have affected the jury." *Id.* at 14. Since this Court could but speculate about this effect, it could not find the penalty phase proceeding had been rendered fundamentally unfair. *Id.*

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[5] Although not for resolution in this case, whether such a process would be constitutionally viable post-*Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is questionable.

The Missouri Supreme Court's decision does not conflict with *Romano* since, as in *Johnson*, it cannot be presumed that, absent that invalid aggravating factor, the jury would have rendered a death verdict. Rather, it comports with this Court's recent decision in *Brown*. After all, "when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *Brown*, 126 S.Ct. at 892, citing *Stringer v. Black*, 503 U.S. 222, 232 (1992).

Because the Missouri Supreme Court's decision is entirely within the parameters of this Court's recent decision in *Brown v. Sanders* and conflicts with no controlling precedent of this Court, Mr. McFadden respectfully requests that this Court deny the State's petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, Mr. McFadden respectfully requests that the petition for a writ of certiorari be denied.

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